

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUGO SANTIAGO MEZA-CORRALES,

Defendant.

NO. CR-05-6048-EFS

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

On February 21, 2006, Defendant Hugo Santiago Meza-Corrales filed a Motion to Dismiss. (Ct. Rec. 22.) Mr. Meza-Corrales' motion was noted for hearing with oral argument on March 7, 2006, during his pretrial conference. However, after reviewing Mr. Meza-Corrales' motion and the Government's response, in which it indicates it does not oppose the motion, the Court finds oral argument unnecessary¹ and hereby grants Defendant's motion.

I. Background

Mr. Meza-Corrales entered the United States from Mexico with his mother in 1984. (Ct. Rec. 23 Ex. A & B.) Mr. Meza-Corrales thereafter attained lawful permanent resident status in 2000. *Id.* at Ex. A. On December 16, 2003, Mr. Meza-Corrales was convicted in Oregon of attempted

¹ See LR 7.1(h)(3).

1 sexual abuse in the first degree in violation of O.R.S. § 161.405(2)(c).

2 *Id.* at Ex. C.

3 On February 20, 2004, the Immigration and Naturalization Service
 4 ("INS") served Mr. Meza-Corrales with a Notice to Appear, claiming,
 5 despite his lawful permanent resident status, he was deportable on the
 6 based on his commission of an aggravated felony, i.e. attempted sexual
 7 abuse in the first degree. *Id.* at Ex. D. On March 3, 2004, in accordance
 8 with the INS Notice to Appear, Mr. Meza-Corrales appeared before an
 9 immigration judge for a deportation hearing. *Id.* at Ex. E. Following the
 10 hearing, the immigration judge entered an order of removal, *Id.* at Ex.
 11 G, and Mr. Meza-Corrales was subsequently deported to Mexico on March 9,
 12 2004, *Id.* at Ex. H.

13 On November 9, 2005, Mr. Meza-Corrales was indicted in the Eastern
 14 District of Washington on a charge he had violated 8 U.S.C. § 1326, by
 15 being an alien in the United States after deportation. (Ct. Rec. 1.) Mr.
 16 Meza-Corrales' March 3, 2004, deportation forms the basis of the November
 17 9, 2005, Indictment. *Id.*

18 II. Analysis

19 Section 1326(a) of Title 8 of the United States Code provides:

20 [A]ny alien who -- (1) has been denied admission, excluded,
 21 deported, or removed or has departed the United States while
 22 an order of exclusion, deportation, or removal is outstanding,
 23 and thereafter (2) enters, attempts to enter, or is at any time
 24 found in, the United States, unless (A) prior to his
 25 reembarkation at a place outside the United States or his
 26 application for admission from foreign contiguous territory,
 the Attorney General has expressly consented to such alien's
 reapplying for admission; or (B) with respect to an alien
 previously denied admission and removed, unless such alien
 shall establish that he was not required to obtain such advance
 consent under this chapter or any prior Act

is criminally liable.

1 "In a criminal prosecution under § 1326, the Due Process Clause of
 2 the Fifth Amendment requires a meaningful opportunity for judicial review
 3 of the underlying deportation." *United States v. Zarate-Martinez*, 133
 4 F.3d 1194, 1197 (9th Cir. 1998). Under such review, if the district
 5 court finds "(1) [the defendant's] due process rights were violated by
 6 defects in his underlying deportation proceeding, and (2) he suffered
 7 prejudice as a result of the defects" the deportation stemming from the
 8 defective proceedings may not be used to prove the defendant violated §
 9 1326. *Id.*; see generally *United States v. Mendoza-Lopez*, 481 U.S. 828
 10 (1987).

11 Mr. Meza-Corrales moves the Court to dismiss the § 1326 charge
 12 brought against him because the deportation relied upon in the Indictment
 13 was invalid. In the most lucid and cogent memorandum filed in support
 14 of such a motion that the Court has had the pleasure of reading, Mr.
 15 Meza-Corrales first contends he was denied due process during his March
 16 3, 2004, deportation hearing when the immigration judge (1) did not
 17 conduct a categorical review and (2) looked beyond his record of
 18 conviction to determine whether his December 16, 2003, Oregon conviction
 19 for attempted sexual abuse in the first degree constituted the removable
 20 offense of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A).
 21 Mr. Meza-Corrales then argues the due process violations occurring during
 22 his deportation proceeding caused him prejudice because he was thereafter
 23 precluded from seeking the plausible relief of voluntary departure. The
 24 Court addresses Mr. Meza-Corrales' arguments below.

25 **A. Defective Deportation Proceeding**

26 Under 8 U.S.C. § 1227(a)(2)(A)(iii), any "alien who is convicted of
 an aggravated felony at any time after admission is deportable." As used

1 in the foregoing statute, "aggravated felony" means "murder, rape, or
2 sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(a). Furthermore, "sexual
3 abuse of a minor" is defined as any offense involving
4 the employment, use, persuasion, inducement, enticement, or
5 coercion of a child to engage in, or assist another person to
6 engage in, sexually explicit conduct or the rape, molestation,
prostitution, or other form of sexual exploitation of children,
or incest with children.

7 *Parrilla v. Gonzales*, 414 F.3d 1038, 1041 (9th Cir. 2005). To determine
8 whether a particular prior conviction constitutes an aggravated felony,
9 immigration judges must first apply the categorical approach of looking
10 only to the statutory definition of the prior convicted offense alleged
11 to be an aggravated felony. *United States v. Tokatly*, 371 F.3d 613, 621
12 (9th Cir. 2004).

13 When it is not clear from the statutory definition of the prior
offense whether it constitutes an aggravated felony, the immigration
14 judge may employ a modified categorical approach and look beyond the
language of the statute to a narrow set of records included in the
15 alien/defendant's record of conviction. *Notosh v. Gonzalez*, 427 F.3d 693,
697 (9th Cir. 2005). This narrow set of records includes the
16 alien/defendant's charging documents, signed plea agreement, and
judgment. *Id.* The immigration judge may not "look beyond the record of
conviction itself to the particular facts underlying the conviction."
Tokatly, 371 F.3d at 620. Under the modified categorical approach, the
17 government carries the burden of clearly establishing the
alien/defendant's conviction constituted an aggravated felony. *United
States v. Kelly*, 422 F.3d 889, 895 (9th Cir. 2005).

26 Mr. Meza-Corrales' due process rights were violated during his
deportation hearing when the immigration judge bypassed the categorical
ORDER * 4

1 approach outlined in *Tokatly* and began his inquiry of whether Defendant's
 2 prior conviction constituted an aggravated felony, i.e. sexual abuse of
 3 a minor, by beginning with a modified categorical approach of reviewing
 4 his record of conviction. (See Ct. Rec. 23 Ex. F at 2-3.) Under the
 5 categorical approach, the immigration judge should have began by
 6 reviewing the language of the Oregon statutes Mr. Meza-Corrales was
 7 previously convicted under to determine whether his underlying Oregon
 8 conviction for attempted sexual abuse in the first degree involved the
 9 sexual abuse of a minor. *Id.* Had this approach been employed, the
 10 immigration judge would have determined Mr. Meza-Corrales' O.R.S. §
 11 161.405(2)(c) conviction (Ct. Rec. 23 Ex. C) did not necessarily involve
 12 the sexual abuse of a minor.

13 Under O.R.S. § 161.405(2)(c), a person is criminally liable for
 14 attempted sexual abuse in the first degree if he intentionally engaged
 15 in conduct constituting a substantial step towards the commission of
 16 crime under O.R.S. § 163.427, Oregon's sexual abuse in the first degree
 17 statute. A person commits sexual abuse in the first degree in Oregon,
 18 if he

- 19 (a) subjects another person to sexual contact and:
 (A) the victim is less than 14 years old of age;
 (B) the victim is subjected to forcible compulsion by the
 actor; or
 (C) the victim is incapable of consent by reason of being
 mentally defective, mentally incapacitated or
 physically helpless; or

- 23 (b) intentionally causes a person under 18 years of age to
 touch or contact the mouth, anus, or sex organs of an
 animal for the purpose of arousing or gratifying the
 sexual desire of a person.

25 O.R.S. § 163.427 (emphasis added). Thus, because subsections (a) (B) and
 26 (a) (C) do not require the involvement of a minor, Mr. Meza-Corrales'

1 underlying Oregon conviction for attempted sexual abuse in the first
2 degree may not have constituted sexual abuse of a minor under *Parrilla*
3 or an aggravated felony under 8 U.S.C. § 1101(a)(43)(A).

4 Next, Mr. Meza-Corrales' due process rights were further violated
5 when the immigration judge looked beyond Mr. Meza-Corrales' record of
6 conviction to facts not contained in his charging documents, plea
7 agreement, or judgment, when he employed the modified categorical
8 approach to determine whether the underlying Oregon conviction involved
9 the sexual abuse of a minor. See *Tokatly*, 371 F.3d at 620; (Ct. Rec. 23
10 Ex. F at 3). Had the immigration judge limited himself to a review of
11 Mr. Meza-Corrales' record of conviction, he would have been unable to
12 determine whether the underlying crime involved a minor because the age
13 of the victim was never referred to in Mr. Meza-Corrales' charging
14 documents or judgment (Ct. Rec. 23 Ex. C), nor mentioned during his
15 change of plea hearing (Ct. Rec. 25 Ex. K). The immigration judge's use
16 of police reports connected to the underlying Oregon conviction to
17 determine the age of Mr. Meza-Corrales' victim (see Ct. Rec. 23 Ex. F at
18 4) and whether the crime constitutes an aggravated felony for removal
19 purposes is prohibited under *Tokatly*, 371 F.3d at 620. For this reason,
20 the Court finds Mr. Meza-Corrales' March 3, 2004, deportation proceedings
21 defective under the Due Process Clause.²

22
23 ² Mr. Meza-Corrales also argues he was denied due process during his
24 deportation proceedings when the immigration judge failed to advise him
25 of his apparent eligibility for relief from removal. Because the Court
26 has already determined Mr. Meza-Corrales' due process rights were
violated, his second due process argument need not be addressed.

1 **B. Prejudice**

2 In a § 1326 criminal proceeding, to successfully challenge the
3 validity of an underlying deportation based on defects in the deportation
4 hearing, a defendant must also demonstrate "he suffered prejudice as a
5 result of the defects." *Zarate-Martinez*, 133 F.3d at 1197; *United States*
6 v. *Proa-Tovar*, 975 F.2d 592, 594 (9th Cir. 1992). To demonstrate
7 prejudice in such a setting, the defendant need only establish he had a
8 "plausible" basis for relief from deportation. See *United States v.*
9 *Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000). In other words, the
10 defendant need only prove that, but for the deportation proceeding
11 defects, it is plausible the outcome of his deportation hearing would
12 have been different. The defendant need not prove he would have actually
13 avoided deportation. *United States v. Jimenez-Marmolejo*, 104 F.3d 1083,
14 1086 (9th Cir. 1996).

15 Voluntary departure is a form of relief from deportation. Voluntary
16 departure is available to all aliens except aggravated felons and
17 terrorists. 8 U.S.C. § 1229c(b). In this instance, because Mr. Meza-
18 Corrales was improperly deemed an aggravated felon by the immigration
19 judge, he was not advised of his eligibility for voluntary departure.
20 Had Defendant been advised of such eligibility, it is plausible he would
21 have taken advantage of the opportunity to voluntarily depart and not
22 been involuntarily removed. Thus, the immigration judge's failure to
23 advise Mr. Meza-Corrales of his eligibility for voluntary departure
24 equates to prejudice under the two-prong *Zarate-Martinez* test. See *Ortiz-*
25 *Lopez*, 385 F.3d 1202 (9th Cir. 2004).

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1 **C. Conclusion**

2 Because Defendant has demonstrated his March 3, 2004, deportation
3 proceeding was defective, i.e. violated the due process clause, and that
4 he was prejudiced by those defects, the deportation stemming from the
5 March 3, 2004, deportation proceedings may not serve as the basis of §
6 1326 conviction. Accordingly, because Mr. Meza-Corrales' § 1326 charge
7 is premised upon said deportation, the charge against him is dismissed.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Defendant's Motion to Dismiss (**Ct. Rec. 22**) is **GRANTED**.
10 2. Defendant's **pretrial conference** set for **March 7, 2006**, and **jury**
11 **trial** set for **March 27, 2006**, are **STRICKEN**.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter
13 this order and to provide copies to counsel, the U.S. Probation Office,
14 U.S. Marshal, and the Jury Administrator.

15 **DATED** this 1st day of March, 2006.

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17 _____
18 S/ Edward F. Shea
19 EDWARD F. SHEA
20 United States District Judge

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